

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN E. NIXON,

Plaintiff,

V.

REGIONAL TRUSTEE SERVICES
CORPORATION, *et al.*,

Defendant.

Case No. C12-1547RSL

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS IN PART AND REMANDING CASE

I. INTRODUCTION

This matter comes before the Court on Plaintiff Brian Nixon’s Motion to Remand (Dkt. #13), Defendants Saxon Mortgage Services, Inc.’s (“Saxon”) and Morgan Stanley Mortgage Capital Holdings, LLC’s (“MSMCH”) Motion to Dismiss (Dkt. #12) and Defendants Ocwen Loan Servicing, LLC (“Ocwen”), Mortgage Electronic Registration Systems, Inc.’s (“MERS”), and U.S. Bank National Association’s (“U.S. Bank”) Motion to Dismiss (Dkt. #15). In conjunction with their motion to dismiss, Ocwen, MERS, and U.S. Bank have requested that the Court take judicial notice of certain publicly recorded documents which are referenced in Plaintiff’s Complaint (Dkt. # 16).

Defendants Regional Trustee Services Corporation (“Regional”) and Bank of America, National Association (“BOA”) have joined Ocwen’s, MERS’s, and U.S. Bank’s motion to

1 dismiss (Dkt. # 20, 26).

2 For the reasons set forth below, the Court GRANTS IN PART Defendants' motions to
 3 dismiss and GRANTS Plaintiff's motion to remand.¹

4 **II. DISCUSSION**

5 **A. Background**

6 On January 22, 2007, Plaintiff obtained a \$213,500 adjustable rate loan from First
 7 Independent Mortgage Company to refinance the existing mortgage on his property. Notice of
 8 Removal, Ex. A (Dkt. # 4) ("Complaint") at ¶¶ 24-26. The loan was secured by a deed of trust
 9 that encumbered the property. Id. at ¶ 27; Request for Judicial Notice (Dkt. # 16) ("Request"),
 10 Ex. 1. The deed of trust identifies Commonwealth Land Title Company as the Trustee and
 11 MERS as "a nominee for Lender and Lender's successors and assigns" and the beneficiary.
 12 Request, Ex. 1 at 2.

13 Plaintiff fell behind on payments on the loan in September 2009. Complaint at ¶ 35. On
 14 June 4, 2010, MERS assigned its interest in the deed of trust to BOA and BOA appointed
 15 Regional as Successor Trustee. Id., Exs. D, E. On that same day, Regional recorded a Notice of
 16 Trustee's Sale on September 3, 2010. Id. at ¶ 52; Complaint, Ex. F. On December 13, 2011,
 17 Regional filed a second Notice of Trustee's Sale on March 16, 2012. Request, Ex. 2. For
 18 reasons not immediately apparent in Plaintiff's Complaint, the Trustee's Sale was postponed
 19 until June 29, 2012, at which time U.S. Bank purchased the property at the Trustee's Sale. Id.,
 20 Ex. 3 at 1-2.

21 Plaintiff alleges that during winter 2012 he was working with Saxon, a loan servicing
 22 company, to modify his loan. Complaint at ¶ 65-66. He also claims that he made three payments
 23 to Saxon between December 2011 and February 2012. Id. On April 2, 2012, Ocwen became the

25 ¹ The Court finds that these matters can be decided on the papers submitted. Saxon's and
 26 MSMCH's request for oral argument is DENIED. Ocwen's, MERS's, and U.S. Bank's request for
 27 judicial notice of (1) the deed of trust, recorded on February 21, 2007, (2) the notice of trustee's sale,
 28 recorded on December 13, 2011 and (3) the trustee's deed, recorded July 12, 2012 (Dkt. # 16) is
 GRANTED.

1 loan servicing company handling Plaintiff's loan. Id. at ¶ 72. Plaintiff did not make any
 2 payments on the loan after February 2, 2012. Id. at ¶ 71.

3 On August 17, 2012, Plaintiff filed suit against Regional, U.S. Bank, BOA, MERS,
 4 MSMCH, Morgan Stanley Mortgage Loan Trust 2007-11AR,² Ocwen and Saxon in King
 5 County Superior Court. Notice of Removal at 2. Plaintiff asserts claims arising under
 6 Washington's Deed of Trust Act ("DTA") and the Fair Debt Collection Practices Act
 7 ("FDCPA"). Complaint at ¶¶ 85-130. Even though the foreclosure sale has already taken place,
 8 Plaintiff seeks to stay the foreclosure of his house and set aside the sale. Id.

9 The case was removed to federal court by Saxon and MSMCH on September 11, 2012,
 10 on the basis of federal question jurisdiction under 28 U.S.C. § 1331 and supplemental
 11 jurisdiction under 28 U.S.C. § 1337(a). Notice of Removal at 2. Defendants Regional, Ocwen,
 12 MERS, and U.S. Bank consented to removal. Id., Ex. A. BOA recently appeared in the case and
 13 consented to removal. Notice of Consent to Removal (Dkt. # 22).

14 **B. Motion to Dismiss**

15 "A Rule 12(b)(6) motion tests the legal sufficiency of a claim." Navarro v. Block, 250
 16 F.3d 729, 732 (9th Cir. 2001). "The relevant inquiry...is not whether the plaintiff has
 17 demonstrated a likelihood of success on the merits" but whether " 'there is no cognizable legal
 18 theory or absence of sufficient facts alleged to support a cognizable legal theory.' " Zamani v.
 19 Carnes, 491 F.3d 990, 996 (9th Cir. 2007); accord Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
 20 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as
 21 true, to 'state a claim to relief that is plausible on its face.' " (quoting Bell Atl. Corp. v.
 22 Twombly, 550 U.S. 544, 570 (2007))).

23 When undertaking that inquiry, the Court must "accept the plaintiffs' allegations as true
 24

25 _____
 26 ² Plaintiff's complaint identifies U.S. Bank and Morgan Stanley Loan Trust 2007-11AR as
 27 separate defendants. Complaint. Based on U.S. Bank's corporate disclosure statement (Dkt. # 10), the
 28 Court finds that these two named defendants are actually a single entity, U.S. Bank National
 Association, as Trustee for Morgan Stanley Mortgage Loan Trust 2007-11AR ("U.S. Bank").

1 and construe them in the light most favorable to plaintiffs.” Gompper v. VISX, Inc., 298 F.3d
 2 893, 895 (9th Cir. 2002) (citation omitted). However, “[a] pleading that offers ‘labels and
 3 conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ ” Iqbal,
 4 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). Under Rule 12(b)(6), the Court’s review
 5 is generally limited to the contents of the complaint. Campanelli v. Bockrath, 100 F.3d 1476,
 6 1479 (9th Cir. 1996). The Court may, however, consider documents attached to the complaint,
 7 documents referenced extensively in the complaint, and matters of judicial notice. U.S. v.
 8 Ritchie, 342 F.3d 903, 908 (9th Cir. 2003).

9 C. FDCPA Claims

10 The purpose of the FDCPA is “to eliminate abusive debt collection practices by debt
 11 collectors, to insure that those debt collectors who refrain from using abusive collection practices
 12 are not competitively disadvantaged, and to promote consistent State action to protect consumers
 13 against debt collection abuses.” 15 U.S.C. § 1692(e). To further those goals, the FDCPA
 14 prohibits debt collectors from invading a consumer’s privacy (§ 1692b); harassing a consumer (§
 15 1692c-d); making false or misleading representations to collect a debt (§ 1692e); using unfair or
 16 unconscionable means to collect a debt (§ 1692f); and furnishing deceptive forms (§ 1692j). The
 17 FDCPA also requires debt collectors to provide a validation of the debt to the consumer. Id. at §
 18 1692g.

19 For purposes of the FDCPA, a “debt collector” is “any person who uses any
 20 instrumentality of interstate commerce or the mails in any business the principal purpose of
 21 which is the collection of any debts, or who regularly collects or attempts to collect, directly, or
 22 indirectly, debts owed or due or asserted to be owed or due another.” Id. at § 1692a(6). Within
 23 the context of the FDCPA, “debt” means “any obligation or alleged obligation of a consumer to
 24 pay money arising out of a transaction in which the money, property, insurance, or services
 25 which are the subject of the transaction are primarily for personal, family, or household
 26 purposes, whether or not such obligation has been reduced to a judgment.” Id. at § 1692a(5).

27 The Ninth Circuit has not yet addressed whether mortgagees and their assignees are “debt
 28 ORDER DISMISSING CLAIM AND REMANDING CASE- 4

1 collectors" and whether the FDCPA applies to non-judicial foreclosure proceedings. However,
 2 the majority of district courts in this circuit have held that a non-judicial foreclosure does not
 3 constitute "debt collection" as defined by the FDCPA. E.g., Tuttle v. Bank of New York
 4 Mellon, 2012 WL 726969, at *3 (W.D.Wash. Mar. 6, 2012); Landayan v. Washington Mut.
 5 Bank, 2009 WL 3047238, at *3 (N.D.Cal. Sept. 18, 2009) (dismissing FDCPA claim with
 6 prejudice because "foreclosing on a deed of trust does not invoke the statutory protections of the
 7 FDCPA"); Deissner v. Mortg. Elect. Registration Sys., 618 F. Supp. 2d 1184, 1189 (D.Ariz.
 8 2009) ("the activity of foreclosing on a property pursuant to a deed of trust is not collection of a
 9 debt within the meaning of the FDCPA." (internal quotation marks omitted)), aff'd 384
 10 Fed.Appx. 609 (9th Cir. 2010); Hulse v. Ocwen Fed. Bank, 195 F. Supp. 2d 1188, 1204 (D.Or.
 11 2002) ("Foreclosing on a trust deed is distinct from the collection of the obligation to pay
 12 money.").

13 The Court agrees with the decisions of the district courts noted above. Plaintiff's claims
 14 under the FDCPA fail as a matter of law and therefore, the Court GRANTS Defendants' motions
 15 to dismiss with respect to claims three through nine in the Complaint.

16 Generally, leave to amend a complaint shall be freely given when justice so requires.
 17 Fed. R. Civ. P. 15(a)(2). However, leave may be denied if amending the complaint would be
 18 futile. Gordon v. City of Oakland, 627 F.3d 1092, 1094 (9th Cir. 2010). Because non-judicial
 19 foreclosure proceedings are not within the ambit of the FDCPA, Plaintiff's FDCPA claims are
 20 DISMISSED with prejudice.

21 **D. Motion to Remand**

22 In any civil action of which a district court has original jurisdiction, the district court has
 23 supplemental jurisdiction over all other claims that form part of the same case or controversy.
 24 28 U.S.C. § 1337(a). "A federal district court with power to hear state law claims has discretion
 25 to keep, or decline to keep, them under the conditions set out in § 1337(c))." Acri v. Varian
 26 Assocs., 114 F.3d 999, 1000 (9th Cir. 2000) (en banc). If the federal claims are dismissed before
 27 trial, the state law claims "should" be dismissed. United Mine Workers v. Gibbs, 383 U.S. 715,
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1 726 (1966). The Supreme Court has stated that “in the usual case in which all federal-law claims
2 are eliminated before trial, the balance of factors . . . will point toward declining to exercise
3 jurisdiction over the remaining state-law claims.” Carnegie-Mellon Univ. v. Cohill, 484 U.S.
4 343, 350 n.7 (1988). Courts also consider the values “of economy, convenience, fairness, and
5 comity.” Acri, 114 F.3d at 1001.

6 In this case, the Court has dismissed all claims over which it had original jurisdiction.
7 Additionally, this Court has not issued any substantive rulings in this case, so it has not acquired
8 any particular expertise in the matter. The Court, therefore, declines to exercise supplemental
9 jurisdiction over Plaintiff’s remaining DTA claims, and remands this case to King County
10 Superior Court.

11 III. CONCLUSION

12 For all the foregoing reasons, the Court GRANTS IN PART Defendants’ motions to
13 dismiss (Dkt. # 12, 15, 26) and GRANTS Plaintiff’s motion to remand (Dkt. # 13). Claims three
14 through nine in the Complaint are DISMISSED with prejudice. Claims one and two in the
15 Complaint are hereby REMANDED to King County Superior Court. Defendants’ request for
16 judicial notice (Dkt. # 16) is GRANTED. The Court directs the Clerk of the Court to transmit
17 the file regarding C12-01547RSL to King County Superior Court.

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20 DATED this 10th day of December, 2012.

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24 Robert S. Lasnik
25 United States District Judge
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